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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1167

STATE OF ALABAMA,
PETITIONER

—VS—

RONALD CONGO,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA
AND
THE COURT OF CRIMINAL APPEALS OF ALABAMA

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INDEX

Subject Index

	Page
Table of Cases	i
Table of Statutes	iii
Prior Opinions	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reason for Granting the Writ	5
Conclusion	9
Appendices	10
Certificate of Service	12

TABLE OF CASES

Page

Boykin v. Alabama, 395 U.S. 238, 23 L.Ed 2d 274 89 S. Ct. 1709 (1969) 2, 4, 5, 8, 10

Congo v. State, ____Ala.____, 269 So 2d 183 (1972) 2, 4, 11

Congo v. State, ____Ala. App.____ 269 So 2d 182 (1972) 1, 4, 10, 11

Hawkins v. State, ____Ala. App.____, 268 So 2d 492 (1972) 7, 8

Honeycutt v. State, 47 Ala. App. 640, 259 So 2d 846 (1972) 5, 10

Ireland v. State, 47 Ala. App. 65, 250 So 2d 602 (1971) 7, 8

Walcott v. State, 288 Ala. 546, 263 So 2d 178 (1972) 5, 10

TABLE OF STATUTES

	Page
28 United States Code 1257(3)	2

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND THE COURT OF CRIMINAL APPEALS OF ALABAMA

The petitioner, the State of Alabama, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Alabama entered in this proceeding on August 15, 1972, review having been sought by the petitioner and denied by the Supreme Court of Alabama on October 12, 1972.

PRIOR OPINIONS

The opinion of the Court of Criminal Appeals of Alabama is reported as: *Congo v. State*, ____Ala. App____, 269

So. 2d 182 (1972). A copy of this opinion is attached hereto as Appendix "A".

The order of the Supreme Court of Alabama denying the writ of certiorari is reported as: *Ex parte State, Ex rel. Attorney General*. In Re: *Gamp v. State*, ____ Ala. ____, 289 So. 2d 188, (1972). A copy of this order is attached hereto as Appendix "B."

JURISDICTION

The opinion and judgment of the Court of Criminal Appeals of Alabama reversing the respondent's conviction was issued on August 15, 1972. On August 31, 1972, the State of Alabama made a timely application for rehearing in the Court of Criminal Appeals of Alabama, said rehearing being denied on September 12, 1972.

The State of Alabama applied, within the time required by law, to the Supreme Court of Alabama for a writ of certiorari, raising the same issue or issues which are raised here, on September 25, 1972. Said petition for a writ of certiorari was denied on October 12, 1972. On October 25, 1972, the State of Alabama made a timely application for a rehearing in the Supreme Court of Alabama, said application for rehearing being denied on November 30, 1972. This petition is filed within the time required by law.

This Honorable Court's jurisdiction is invoked under Title 28, United States Code 1257(3).

III

QUESTIONS PRESENTED

In the case of *Boykin v. Alabama* (395 U.S. 238, 89 S. Ct.

395 U.S. 238 (1969), this Honorable Court held that the Fourteenth Amendment to the Constitution of the United States requires that where an accused person pleads guilty to an indictment, the record must show affirmative evidence that such plea was voluntarily and intelligently entered. In light of Boykin, this case presents the following question:

Must the record in an appeal from a criminal conviction resulting from a guilty plea contain a transcript of an oral colloquy between the trial judge and the accused or may the Boykin requirements be met by a written form which is contained in the record?

STATEMENT OF THE CASE

The respondent was indicted by the May, 1971, Term of the Grand Jury of Madison County, Alabama, for the crimes of burglary in the second degree, grand larceny and buying, receiving, concealing or aiding in concealing stolen property worth $1,480.00. (R. pp. 2-3)

On September 24, 1971, he was arraigned on the indictment and entered a plea of not guilty to the indictment. (R. p. 4)

On October 18, 1971, the trial court presented the respondent with a written "Notice to Defendant of Constitutional Rights." This document contained a complete and highly detailed statement and explanation of the respondent's constitutional rights and the fact that a plea of guilty would waive those rights. Also contained in this document was an instruction to the respondent to examine the document and to discuss its contents with his attorney. The notice also invited the respondent's questions to the court on the contents.

of the document. This document was read by the respondent and to him by his attorney and its contents were discussed by them. (R. pp. 7-8)

After receiving the above notice, the respondent withdrew his plea of not guilty and entered a plea of guilty to the third count in the indictment — buying, receiving, concealing or aiding in concealing stolen property — the other counts in the indictment being "nolle prossed". (R. p. 9)

The respondent was then adjudged guilty. (R. p. 9)

On February 17, 1972, the respondent was sentenced to five years imprisonment. (R. p. 13)

Appeal was taken from this judgment and sentence to the Court of Criminal Appeals of Alabama. (R. p. 14)

On August 15, 1972, the Court of Criminal Appeals reversed the judgment of conviction on the grounds that the record contained no colloquy "between the trial judge and the appellant at the time of taking the plea of guilty to show compliance with *Boykin v. Alabama*, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274." *Congo v. State*, ——— Ala. App. ———, 269 So. 2d 182, 183. (Appendix A)

On August 21, 1972, the State of Alabama applied for rehearing in the Court of Criminal Appeals of Alabama. On September 12, 1972, the Court of Criminal Appeals of Alabama overruled the State's application for rehearing.

On September 25, 1972, the State of Alabama applied to the Supreme Court of Alabama for a writ of certiorari to review the decision of the Court of Criminal Appeals of Alabama. The writ was denied on October 12, 1972. *Congo*

v. State, ——— Ala. ———, 269 So. 2d 183 (Appendix "B")

On October 25, 1972, the State of Alabama applied to the Supreme Court of Alabama for a rehearing on the denial of the writ. Rehearing was denied on November 30, 1972.

REASON FOR GRANTING THE WRIT

THIS CASE PRESENTS RECURRING QUESTIONS AS TO HOW THE STATES MAY COMPLY WITH THE *BOYKIN* DOCTRINE.

In the *Boykin v. Alabama* (395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 [1969]. This Honorable Court held that a conviction for a criminal offense which is based on a guilty plea is void unless the record contains sufficient evidence that the plea was voluntarily and intelligently entered. Alabama's appellate courts have reversed numerous cases because the record failed to comply with the *Boykin* requirements. See *Walcott v. State*, 288 Ala. 546, 263 So. 2d 178 (1972) and *Honeycutt v. State*, 47 Ala. App 640, 259 So. 2d 846 (1972).

The instant case was reversed by the Court of Criminal Appeals because it contained no oral colloquy between the trial judge and the accused which met the requirements of the *Boykin* Doctrine. Indeed the record contained no transcript at all of an oral collquy. It did, however, contain something much better; it contained a highly detailed statement of the respondent's rights and the consequences of his guilty plea. This statement, as it appears at pages 7 and 8 of the record, informed the respondent in ordinary but accurate language of the following:

A. The purpose of the statement

B. The crime with which he was charged

C. The maximum and minimum sentences

D. His right against self-incrimination and his right to testify in his own behalf

E. His right not to have his failure to testify subjected to comment or otherwise be held against him.

F. His right to have his communications with his attorney remain confidential

G. His right to stand on his plea of not guilty and to have a trial by jury

H. His right to a public trial

I. His right to confront and examine the adverse witnesses and to compel the attendance of witnesses in his own behalf.

J. His right to be presumed innocent until proven guilty beyond a reasonable doubt to the satisfaction of the jury

K. That he would have no burden of proof at all at the trial

L. His right to enter other special pleas, e. g., insanity

M. That he should not enter a plea of guilty unless he actually was guilty and desired no trial by jury

N. That his plea of guilty would waive all of the rights previously explained to him.

Had the trial judge read this statement to the respondent in open court and received a response from the respondent indicating that he understood it and had the transcript of this colloquy been included in the record, this case would have been affirmed by the Court of Criminal Appeals of Alabama. Clearly the *Boykin* doctrine would have been met and exceeded in the respondent's favor.

But this was not done. Instead the statement was given to the respondent in writing. At the end of the statement the respondent was informed that his attorney would go over his rights and the consequences of his proposed plea, as they were explained in the statement, with him, and the respondent was directed to ask the Court any questions he might have about the matters in the statement. The respondent then read the statement and had it read to him by his attorney. The respondent and his attorney discussed the statement in detail, then the attorney certified to these readings and this discussion and returned the form to the Court.

The question which is presented, then, is: Must the *Boykin* doctrine be complied with by oral colloquy or may written forms be used as well?

In presenting this petition to this Honorable Court the petitioner is, or would appear to be, embarrassed by two cases: *Ireland v. State*, (47 Ala. App. 65, 250 So. 2d 602 [1971] and *Hawkins v. State*, (_____ Ala. App. _____, 268 So. 2d 492 [1972]). Both of these cases approve the use of sufficient written forms in complying with *Boykin*. However, these cases do nothing except point up the need

for clarification of this matter by this Honorable Court. Both of these cases, *Ireland* and *Hawkins*, approve the use of written forms in *dicta*. In *Ireland* the Court noted that the guilty plea was entered and accepted over six months prior to the *Boykin* decision and that *Boykin* did not apply retroactively. Therefore, the language in *Ireland* approving the written form was unnecessary to the decision in the case. No written form was used in *Hawkins;* the case was reversed because of the insufficiency of the *oral* colloquy. These two cases, together within the instant case, compel the conclusion that an enormous amount of confusion exists with regard to the *Boykin* doctrine.

Because of this confusion and especially because of the holding of the Court of Criminal Appeals in the instant case, Alabama trial judges will hestitate to use written forms in complying with *Boykin*. Yet, written forms, such as the one used in this case, fulfill the purposes of the *Boykin* doctrine better than oral colloquys.

The purposes of the *Boykin* doctrine as set out in *Boykin v. Alabama*, (395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 [1969]) are to insure that the accused understand his Federal constitutional rights and that his plea guilty waives these rights and that he waives these rights voluntarily and, finally, to preserve as part of the record, evidence of this voluntary and intelligent waiver. A carefully worded printed form which is explained to an accused by his attorney under the supervision of the court and then is entered as part of the record would seem to perform this function far better than an oral colloquy which may be presented in legalese quite incomprehensible to the accused. Few accused persons would be bold enough to tell the court that they do not understand some portion of the oral colloquy. Oral colloquys are often reduced to a mere "going through the motions."

CONCLUSION

For this reason, a writ of certiorari should issue to review the judgment and opinion of the Court of Criminal Appeals of Alabama.

Respectfully submitted,

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APPENDIX "A"

RONALD CONGO

V.

STATE

(_____ALA. APP._____, 269 So. 2d 182)

8 Div. 278

Court of Criminal Appeals of Alabama

Aug. 15, 1972.

Rehearing Denied Sept. 12, 1972.

TYSON, Judge.

The three count indictment charged burglary in the second degree, grand larceny, and buying, receiving, concealing, or aiding in concealing certain alleged stolen property. Appellant pleaded guilty, accompanied by counsel, and judgment set sentence at five years imprisonment in the penitentiary.

[1] The record is devoid of any colloquy between the trial judge and the appellant at the time of taking the plea of guilty to show compliance with Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274. *Boykin*, supra, requires this Court to review this colloquy in its entirety whether the appellant is indigent, or otherwise.

[2] On authority of Honeycutt v. Alabama, 48 Ala. App. _____, 259 So.2d 846; and Walcott v. State, 288 Ala. _____, 263 So.2d 178, the judgment below must be reversed and the cause remanded.

Reversed and remanded.

All the Judges concur.

APPENDIX "B"

IN RE RONALD CONGO

V.

STATE OF ALABAMA

Ex parte STATE of Alabama ex rel.

ATTORNEY GENERAL

(_____Ala._____, 269 So.2d 183)

SC 122.

Supreme Court of Alabama.

Oct. 12, 1972.

Rehearing Denied Nov. 30, 1972.

Certiorari to the Court of Criminal Appeals.

SOMERVILLE, Justice.

Petition of the State by its Attorney General for Certiorari to the Court of Criminal Appeals to review and revise the judgment and decision of that Court in Congo v. State, 269 So.2d 182.

Writ denied.

HEFLIN, C. J., and MERRILL, HARWOOD and MADDOX, JJ., concur.

CERTIFICATE OF SERVICE

I, Joseph G. L. Morston, III one of the attorneys for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this _____ day of February, 1973, I did serve the requisite number of copies of the foregoing Petition for Certiorari on the Attorney for the Respondent by mailing said copies to him, postage prepaid, and addressed as follows:

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